

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)

Proposal for Creation of a)
Class A (Low Power) Television)
Broadcast Service)

RM-9260

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Mass Media Bureau

COMMENTS OF COX BROADCASTING, INC.

Cox Broadcasting, Inc. ("Cox"), by its attorneys, submits herewith its Comments on the Petition for Rulemaking submitted by Community Broadcasters Association ("CBA"), proposing the creation of a "Class A" TV service.^{1/} As shown herein, the Commission should not initiate a rulemaking to consider CBA's proposal.

DTV is only in its embryonic stage. The television broadcast industry will face many demands as part of the transition to and operation of a DTV broadcast service. As part of that process, the industry and the Commission must grapple with difficult DTV issues such as must-carry, ancillary fees and even the preemption of state and local zoning laws. Over the next few years the FCC will have to review over 1500 commercial and non-commercial DTV construction permit applications.^{2/} An unknown number of modification requests will surely follow. Undoubtedly, other unforeseen DTV issues may arise in the future. With a virtually

^{1/} Community Broadcasters Association, Petition for Rulemaking, RM-9260 (filed Sept. 30, 1997, as amended Mar. 18, 1998) (the "Petition for Rule Making").

^{2/} Broadcast Station Totals as of April 30, 1998, *News Release* (May 18, 1998).

untested new service on the horizon, the Commission should wait to address—by actual operation and not predicted theory—the inevitable problems associated with implementing DTV prior to undertaking the added responsibilities of overseeing yet another new broadcast service. A new protected class of low power stations will inspire a gold rush mentality, spawning a flood of Class A applications. This may swamp the Commission's processing mechanisms creating avoidable regulatory gridlock. In addition, the Commission will be faced with new issues that naturally arise out of the introduction of a new broadcast service.^{3/} The Commission has repeatedly recognized that it must ensure the implementation of DTV is achieved before taking steps to address a low power service.^{4/} To initiate a rulemaking proceeding for a Class A service would conflict with existing Commission policy and would unfairly burden those who have relied on this policy throughout the DTV proceedings. When the dust finally clears from the DTV transition and it appears that a low power service can coexist with DTV, only then, if at all, would be an appropriate time to address the issue. Now, however, is not the time.

The introduction of a Class A service would interfere with the roll-out of DTV. The interjection of a protected class of low power stations will effectively limit or preclude full power stations' options to modify their DTV facilities. Such an effect may be disastrous to a

^{3/} For instance, the Commission will undoubtedly face scenarios where TV translator licensees will file applications characterizing their facility as a low power station merely to secure the benefits of a protected Class A contour but who intend to continue operating the facility as a translator.

^{4/} See, e.g., *Memorandum Opinion and Order of the Sixth Report and Order*, MM Dkt. No. 87-268, FCC 98-24, ¶ 106 (released Feb.23, 1998) ("Sixth Report and Order").

station's ability to upgrade its facilities for DTV as it may be precluded from serving important segments of its community. Viewers as well, who have a legitimate expectation of service from local full service stations,^{5/} may suffer when full service stations' modifications are blocked by protected Class A stations. Moreover, the risk of this modification paralysis may serve to discourage long-term financial backing in an industry that requires an extensive supply of capital to upgrade facilities to provide DTV service. In addition, CBA's proposal of first-in-time prospective protection for low power stations fails to address the underlying and fundamental balance of interests determined by the Commission: a preference for stations that reach a broad audience. The encumbrances created by the proposed Class A stations would thus preclude the introduction of new full power stations to communities and cripple the possibility of additional over-the-air networks.

The Commission sixteen years ago concluded that low power stations are a secondary service.^{6/} The Commission has repeatedly held firm to this finding throughout the DTV proceedings.^{7/} The Commission has stated that

full-service stations, by definition, can reach larger audiences than the low power television service stations. It thus furthers our goals in this proceeding to permit full-service stations to take priority over the secondary services in the implementation of DTV, and we do not believe that this policy entails a

^{5/} See *Low Power Television Service*, 51 RR 2d 476, 488 (1982).

^{6/} See *id.*

^{7/} See, e.g., *Sixth Report and Order*, ¶ 106.

comprehensive change in the secondary status of low-power television service stations.^{8/}

Other attempts outside of the DTV proceedings to elevate the status of low power television services have been similarly rejected by the Commission.^{9/} Nothing has happened since 1982 that warrants reversing this policy. Indeed, CBA does not demonstrate what circumstances justify a departure from the Commission's well established precedent. While it makes sense from a strategic perspective for low power operators to attempt to leverage their current status and capture the benefits of full-power protection without offering reciprocal full-market service, it hardly justifies the Commission sponsoring this land-grab. In light of the dawn of DTV, it is boggling that CBA would seriously suggest grafting an elevated status for low power stations onto an widely-accepted regulatory framework.

^{8/} *Memorandum Opinion and Order of the Third Report and Order*, MM Dkt. No. 87-268, 7 FCC Rcd 6924, 6953 (Oct. 16, 1992) (citing *Memorandum Opinion and Order of the Second Report and Order*, MM Dkt. No. 87-268, 7 FCC Rcd 3340, 3350-52 (1992)).

^{9/} *See Amendment of Parts 73 and 74 of the Commission's Rules Concerning Full Power Television and Low Power Television and Low Power Television and Television Translator Stations*, 3 FCC Rcd 1974, 1975 (1988) (citing *Low Power Television Service (Displaced Licensees)*, 59 RR 2d 1216 (1986) (affirming denial of a rule making proposal to guarantee displaced translator and low power television licensees access to another channel); *Memorandum Opinion and Order*, 49 Fed. Reg. 49466 (December 20, 1984) (addressing petitions seeking reconsideration or clarification of the *Second Report and Order* in Gen. Docket No. 81-786, which authorized the use of random selection or lotteries to choose from among certain competing applicants); *Random Selection Lotteries*, 93 FCC 2d 952 (1983), *erratum* 48 Fed. Reg. 34309 (July 27, 1983), *Order Granting Stay of Section 22.23 (a)*, FCC 83-378 (released August 9, 1983) (denying a request to alter the processing procedures for pending television translator and low power television applicants, stating that the proposal directly conflicted with its present views on the fundamental concept of the services as secondary services)).

CBA claims that a Class A service is needed to protect a unique source of local programming.^{10/} While a laudable goal, CBA offers no evidence that low power stations either air more local programming or are more sensitive to a community's programming needs than full power stations. Moreover, restricting low power and translator stations to secondary status was based on sound technical considerations of avoiding interference to full service broadcasters. However, CBA's proposal would elevate programming above these technical considerations by providing protected contour coverage to Class A stations. This proposal, however, ignores long standing Commission precedent which holds that non-technical factors such as programming can never be the basis for waiving the Commission's technical rules.^{11/}

In sum, consideration of CBA's proposal in a formal rulemaking proceeding is unsound. The Commission would be wise to prioritize and focus on DTV before entertaining the ambitions of a low power service. The Commission need not revisit low power's status as a secondary service. Moreover, with broadcast spectrum at a premium, CBA's proposal may hinder stations' abilities to roll-out DTV service and may ultimately impair viewers' ability to enjoy the benefits of full power stations in their community.

^{10/} Petition for Rulemaking at 1; *see* Petition's proposed rule § 73.627(b)(ii).

^{11/} *See Open Media Corp.*, 8 FCC Rcd 4070 (1993).

For these reasons, Cox urges the Commission to conserve its efforts and go no further in entertaining CBA's proposal. Accordingly, CBA's petition should be dismissed without further consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Comments of Cox Broadcasting, Inc." was sent on this 22nd day of May, 1998, via United States first class mail postage pre-paid to the following:

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